IN THE

Supreme Court of the United States

No. 722. OCTOBER TERM, 1945.

CARL McINTIRE; YOUNG PEOPLE'S CHURCH OF THE AIR, INC., a corporation; WORD OF LIFE FELLOWSHIP, INC., a corporation; THEODORE ELSNER, E. SCHUYLER ENGLISH; HIGHWAY MISSION TABERNACLE, a corporation; WILEY MISSION, INC., a corporation; and WESLEYAN METHODIST CHURCH, a corporation, Petitioners,

v.

WM. PENN BROADCASTING COMPANY of Philadelphia, owner and operator of Radio Broadcasting Station "WPEN", Respondent.

BRIEF FOR RESPONDENT, WM. PENN BROADCASTING COMPANY OF PHILADELPHIA, OWNER AND OPERATOR OF RADIO BROADCASTING STATION "WPEN", IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

Wm. Clarke Mason,
A. Allen Woodruff,
Thomas B. K. Ringe,
W. Theodore Pierson,
F. Cleveland Hedrick, Jr.,
Attorneys for Respondent.

Morgan, Lewis & Bockius,
2107 Fidelity-Philadelphia
Trust Building,
Philadelphia, Pa.

Pierson and Ball,
Munsey Building,
Washington, D. C.
Of Counsel.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1945. No. 722.

Carl McIntire; Young People's Church of the Air, Inc., a corporation; Word of Life Fellowship, Inc., a corporation; Theodore Elsner, E. Schuyler English, Highway Mission Tabernacle, a corporation; Wiley Mission, Inc., a corporation; and Wesleyan Methodist Church, a corporation,

Petitioners,

v.

Wm. Penn Broadcasting Company of Philadelphia, owner and operator of Radio Broadcasting Station "WPEN",

Respondent.

BRIEF FOR RESPONDENT, WM. PENN BROADCASTING COMPANY OF PHILADELPHIA, OWNER AND OPERATOR OF RADIO BROADCASTING STATION "WPEN", IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

STATEMENT.

The Respondent in this Court and the Defendant in the District Court, Wm. Penn Broadcasting Company, a Delaware corporation (hereinafter called "WPEN" or "the Station"), is the owner of a radio broadcasting station in the City of Philadelphia, Pennsylvania, which it has been operating for a number of years with prescribed power (5 kilowatts) and upon a prescribed frequency (950 kilocycle "wave-length") under a series of short-term licenses issued by the Federal Communications Commission pursuant to the provisions of the Communications Act of 1934 (29a).

The present license of the station provides, *inter alia*, as follows (32a):

> "The licensee shall, during the term of this license, render such broadcasting service as will serve public interest, convenience, or necessity to the full extent of the privileges herein conferred.
>
> "This license shall not vest in the licensee any right to operate the station nor any right in the use of the frequency designated in the license beyond the term hereof, nor in any other manner than authorized herein. Neither the license nor the right granted hereunder shall be assigned or otherwise transferred in violation of the Communications Act of 1934".

Like other radio broadcasting stations similarly operated throughout the United States, WPEN has the right and duty of determining what programs shall be broadcast over its facilities and is obliged to reserve to itself the final decision as to what programs will best serve the public interest.* The said programs consist of a continuous series of short features supplied either by the

* See *National Broadcasting Co.* v. *United States*, 319 U. S. 190, 205 (1943). And see also the language used in the letter from the Federal Communications Commission (Record, p. 19a).

Station's own staff or by other parties who are commonly known as "advertisers" (36a). Advertisers (or "Sponsors", as they are sometimes called) contract separately with the Station for the use of its facilities for specified time on specified days, and the charges (if any) for this privilege are agreed to in advance and specifically set forth in the contract. Payments made to the Station by the "advertisers" constitute the Station's principal source of income (21a). Inasmuch as the "advertiser" supplies his own feature, choice by the Station of its programs necessarily involves a selection and choosing by the Station of the "advertisers" with whom it is willing to contract.

On February 20, 1945, in the course of conducting its business as above described, WPEN had outstanding a number of contracts with "advertisers", including, *inter alia,* the eight Plaintiffs in this case (Petitioners in this Court) who were each "sponsoring" the broadcast of their respective religious services over the facilities of WPEN on a "commercial" or paid-for basis. Listed in the chronological order of their expiration dates, those contracts were as follows:

*Specified Expiration Date**	*Name of Plaintiff*	*Date of Contract*	*Page of Printed Record*
April 1, 1945	Young Peoples Church of the Air, Inc.....	May 3, 1944	42a
May 26, 1945	E. Schuyler English (The Pilgrims)	May 2, 1944	50a
May 27, 1945	Carl McIntire.....	May 18, 1944	36a
June 17, 1945	Wesleyan Methodist Church	May 8, 1944	54a
June 23, 1945	Word of Life Fellowship, Inc.	May 8, 1944	45a
June 30, 1945	Wiley Mission, Inc.....	June 12, 1944	56a
July 22, 1945	Wiley Mission, Inc.....	June 12, 1944	58a
Sept. 23 1945	Highway Mission Tabernacle	Aug. 28, 1944	52a
Nov. 11, 1945	Theodore Elsner (Phila. Gospel Tabernacle).....	Oct. 28, 1944	47a

* By "specified expiration date" is here meant the date upon which the contract normally would expire in the absence of earlier termination by cancellation pursuant to its terms.

Each of the contracts above mentioned included among its "Terms and Conditions" the following provision (wherein the word "Company" referred to WPEN and the word "Sponsor" referred to the applicable Plaintiff), viz. (40a, 43a, 46a, 48a, 51a, 53a, 55a, 57a and 59a):

> "6. The Company shall have the right to terminate this contract upon giving two week's notice in writing, to the Sponsor, by registered mail, and at the expiration of the time mentioned in said notice this contract shall terminate as if the date set forth therein were the date provided in this contract for the termination thereof."

On the date above mentioned, to wit, February 20, 1945, acting pursuant to the options reserved to it under the said contracts, WPEN duly served upon each of the Plaintiffs in this case (28a) a written notice of its election to terminate the contract prior to its expiration date, and although the date so accelerated would in all cases have fallen on a day prior to Easter Sunday, April 1, 1945, Defendant offered in said notice to permit each Plaintiff to continue its broadcasting schedules to and including April 1, 1945.

Although the notices of termination addressed to the Plaintiffs were not in each case identical, they were all substantially similar, and the following, which is a copy of the notice sent by WPEN to Plaintiff, Rev. Carl McIntire, is completely representative of all the others (17a, 41a, 44a, 46a, 49a, 52a, 54a, 56a, 59a).

> "This is to advise you that the Wm. Penn Broadcasting Company is adopting a new policy with respect to religious programs. Instead of time for religious broadcasts being sold on a commercial basis as has heretofore been done, we plan to inaugurate on a substantial basis, as a public service a series of religious broadcasts of general interest, the time for which will not be sold.

*"Your present commercial contract provides for termination upon two weeks' notice and such notice is hereby given.** We are however willing, if you desire and so advise us, to have the termination effective on April 2, 1945, by which date we wish to have our new policy in full operation.

"This policy is in conformity with the general practice of principal radio stations throughout the country. We believe it will make for greater public service to the Philadelphia community in the important matter of carrying religious worship into the home through radio broadcasting."

All of the Plaintiffs continued to broadcast their programs over WPEN's station through Easter Sunday, *i. e.*, April 1, 1945 (28a); and subsequent to that day Defendant has declined to permit the continuance of such broadcasts. All of the contracts have now expired by their own terms, although at the time of the argument in the Court below on July 26, 1945, two of the Plaintiffs (Appellants in the Circuit Court) had contracts as to which the original "expiration date" had not then arrived, namely, Highway Mission Tabernacle, with an original term ending on September 23, 1945 (52a), and Theodore Elsner (operating as the Philadelphia Gospel Tabernacle), with an original term ending on November 11, 1945 (47a).

Certain of the Plaintiffs in this suit after beginning this litigation petitioned the Federal Communications Commission, complaining that WPEN had acted illegally in cancelling their contracts. The Commission, on April 24, 1945 (Mimeograph No. 81,846 dated April 24, 1945), denied the petition, stating in part:

"The policy of Congress as expressed in the Communications Act of 1934 contemplates that the selection and presentation of radio programs shall

* Emphasis supplied.

be vested in the individual station licensee. * * * The Commission has carefully considered the matters alleged in your complaint and the representations made to it by the licensee of Station WPEN to determine whether there has been a violation of the licensee's obligation to operate in the public interest. The Commission is of the opinion that the representations of Station WPEN are consonant with the licensee's obligation to present a diversified and well-rounded program service. For the foregoing reasons, the Commission has today denied your petition."

A subsequent petition for reconsideration and rehearing was denied on June 26, 1945 (Broadcast Actions by the Federal Communications Commission, Mimeograph No. 83,092; Report No. 688).

The present action was commenced on April 6, 1945, by the filing of a Bill in Equity, which was followed by a motion for the issuance of a temporary restraining order, which the District Court denied on April 10, 1945 (20a).

On April 12, 1945, Plaintiffs deserted the "common carrier" theory, upon which they theretofore relied, and filed an amended Bill. On April 16, 1945, a Stipulation of Counsel (27a) was filed, by which copies of all the contracts involved and a copy of the Defendant's radio broadcasting station license issued by the Federal Communications Commission were made a part of the Amended Bill, together with the fact that the Plaintiffs had been permitted by Defendant to continue their broadcasting programs through Easter Sunday, April 1, 1945.

Thereafter, on April 18, 1945, upon Defendant's written Motion (60a) to dismiss the Bill in its amended form, the District Court entered its final decree (62a) granting such Motion.

The proceedings in the District Court were all before District Judge William H. Kirkpatrick.

Immediately following the entry of the final decree, the Petitioners (Plaintiffs in the District Court) appealed

(63a) to the Circuit Court of Appeals for the Third Circuit, wherein argument was had before Circuit Judges John Biggs, Jr., and Curtis L. Waller and Gerald McLaughlin on July 26, 1945 (73a).

On October 12, 1945, the Circuit Court affirmed the judgment of the District Court with an opinion (74a) by Judge Biggs which concluded with the following paragraph:

> "The court below dismissed the amended complaint upon the motion of the defendant on the ground that it stated no cause of action against the defendant. It committed no error in doing so" (81a).

ARGUMENT.

1. The Federal Communications Commission, having jurisdiction over the performance of the Respondent in the public interest, has properly denied the relief sought.

In their Bill filed in the District Court, the Petitioners alleged that the acts of the Respondent were illegal under the Communications Act of 1934 as in violation of the public interest. This complaint was twice presented to the Federal Communications Commission in the form of petitions for relief. The Commission denied both petitions, and Petitioners failed to avail themselves of their opportunity for judicial review as provided in Section 402(a) of the Communications Act of 1934, as amended.

In view of the foregoing, it is submitted that the Court below properly held as follows:

> "The authority of the Commission as defined in Section 303, 47 U. S. C. A. § 303 includes the power to pass upon such allegations of unfair treatment as the

plaintiffs make here respecting the defendant. The Commission may refuse to renew the defendant's license if it has failed to act in the public interest. Indeed certain of the plaintiffs have complained to the Commission of the defendant's actions which are the basis for the suit at bar, but the Commission was of the opinion that the defendant's action in cancelling the contracts was not against the public interest. In the case at bar, however, we are concerned only with the question of whether the plaintiffs have stated any cause of action against the defendant cognizable in a district court of the United States. We are of the opinion that they have not done so for the reasons stated immediately hereinafter" (77a).

* * * * * * *

"An appeal lay from the order of the Commission under Section 402(a) of the Federal Communications Act, 47 U. S. C. A. § 402(a). See the Urgent Deficiencies Act, 28 U. S. C. A. § 47. None of the plaintiffs availed themselves of the right of review thus afforded" (78a).

Insofar as the Petitioners seek a determination of whether the acts of the Respondent were in the public interest; the Court below properly found that Petitioners were in effect asking a court of equity to supplant its judgment for that of the Federal Communications Commission by means of the harsh and peculiarly inappropriate instrumentality of injunction, with respect to a question which is exclusively within the jurisdiction of the Commission, and with reference to which the statute has provided specific procedure for judicial review not availed of by the Petitioners.

Clearly, the Court below correctly affirmed the District Court in holding that no reason had been shown for judicial interference.

2. The Supreme Court of the United States has already passed upon the questions alleged to be novel.

The Petitioners assert as a principal "reason for granting the writ" that "* * * This is the first time that a question involving the rights of an advertiser or sponsor (the terms are used interchangeably in the decisions) has been presented to this court for review." Importance may be attached to the fact that Petitioners do not allege either (1) that the principles involved have not before been passed upon by the Supreme Court of the United States or (2) that there is conflict with respect to such principles in the judgments which have been handed down by the Courts of the several Circuits. It is submitted that the Petitioners did not so allege because the principles have been decided by this Court; that such principles were followed by the Court below; and that there is no conflict among the Circuits.

The incidental fact that the particular Petitioners happen to be advertisers or sponsors can, of itself, form no proper foundation for the granting of the Writ.

The issues sought to be raised in the District Court, in the Circuit Court, and now in this Court are based upon the Petitioners' allegations that: (1) The Respondent's business is a "public utility"; (2) The Respondent's refusal to do business on Petitioners' terms is in violation of the anti-trust laws and the Communications Act of 1934; (3) The Petitioners have acquired a property right to broadcast over the Respondent's station by reason of some undefined "prescription" or "estoppel"; and (4) The Respondent's refusal to the Petitioners of broadcasting time upon their own terms has denied the Petitioners free speech and freedom of religion over the radio.

That Respondent is not a "public utility" in the absence of a dedication of its business to the purpose of serving advertisers, or legislation preventing it from

selecting its own customers, is clear from the decision of this Court in *Federal Trade Commission* v. *Raymond Bros.-Clark Co.*, 263 U. S. 565, 573 (1924). The Supreme Court of Pennsylvania has explicitly stated that a radio broadcasting station is not a public utility and may choose between applicants for its facilities. *Summit Hotel Co.* v. *National Broadcasting Co.*, 336 Pa. 182, 197 (1939).

The difference between the duties and the responsibilities of a radio station carrying a Federal license and those of a "public utility" or common carrier are clearly apparent from a reading of *National Broadcasting Co.* v. *United States*, 319 U. S. 190 (1943), and *Federal Communications Commission* v. *Sanders Brothers Radio Station*, 309 U. S. 470 (1940). Those cases show that the radio station not only has a right, but a clear duty, to determine what programs shall be broadcast over its facilities, and to reserve to itself the final decision as to what programs will best serve the public interest; further, that a radio station is in violation of the provisions of the Communications Act of 1934 if it agrees to accept programs on any basis other than its own responsibility and reasonable decision that a program is in the "interest of the listening public."

Clearly, the Petitioners' contention that, in addition to the interest of the listening public, there is an obligation (like that of a public utility) to sell time without respect to program content, which controls the decision of the Respondent in the selection of programs to broadcast, has already been settled against the Petitioners.

That there is no basis for Petitioners' claim that Respondent has violated the anti-trust laws appears from the most cursory examination of the facts and the pleadings, which are wholly void of any suggestion of the usual allegations which must form the basis of any such complaint. This contention is completely and effectually disposed of by the Circuit Court's comment with respect to the failure of Petitioners to set forth in the amended com-

plaint allegations sufficient "to state any cause of action under the anti-trust laws." The Court stated:

> "For example, it is not alleged that the defendant is in a dominant position in the broadcasting field or that it is a member of a chain which so monopolizes radio broadcasting as to render it impossible for the plaintiffs to find other outlets for their broadcasts. Neither conspiracy nor concert of action is asserted. As we stated in Goldman Theatres, Inc. *v.* Loew's Inc., F. 2d , , paraphrasing a statement in United States *v.* Socony-Vacuum Oil Co. (C. C. A. 7), 105 F. 2d 809, 825, 'The purpose of the anti-trust laws—an intendment to secure equality of opportunity—is thwarted if group power is utilized to eliminate a competitor who is equipped to compete.' The plaintiffs do not allege that the defendant seeks to eliminate a competitor by refusing to sell radio time to the plaintiffs. It is not asserted that the defendant entered into a conspiracy with the plaintiffs' competitors in religious broadcasting to eliminate the plaintiffs from the religious broadcasting field. Indeed, in justice to the plaintiffs it should be stated that they do not assert expressly that they are competitors in a field of religious broadcasting or that religious broadcasting is a commodity. Properly they have avoided such allegations but the plaintiffs have stated no cause of action under the anti-trust laws of the United States.
>
> "These allegations may conceivably be construed as relating to some vague charge of unfair competition. But the plaintiffs do not assert that they are selling a commodity. The allegations seem to charge an 'illegal discrimination' in that the defendant insists on preferring other religious broadcasters to the plaintiffs. But there is no reason, the FCC permitting and no violation of the anti-trust laws being involved,

why the defendant may not sell time to whomever it pleases. As we have stated, Congress has confided the selection of program material to be broadcast to the taste and discrimination of the broadcasting stations" (78a-79a).

That Petitioners have no "property right" to broadcast over any radio station is clear from an elementary understanding of the art and the law relating thereto.

That the Petitioners have not been denied their constitutional guarantee of freedom of speech and freedom of worship is clear. As the Court below stated:

"True, if a man is to speak or preach he must have some place from which to do it. This does not mean, however, that he may seize a particular radio station for his forum. See the apt language of Mr. Justice Frankfurter in National Broadcasting Co. *v.* United States, *supra,* at p. , 'Unlike other modes of expression radio inherently is not available to all.'

"Assuming *arguendo* that the defendant's cancellations of the plaintiffs' contracts have limited plaintiffs' opportunities to speak or preach freely, the First Amendment was intended to operate as a limitation to the actions of Congress and of the federal government. The defendant is not an instrumentality of the federal government but a privately owned corporation. The plaintiffs seek to endow WPEN with the quality of an agency of the federal government and endeavor to employ a kind of 'trustee-of-public-interest' doctrine to that end. But Congress has not made WPEN an agency of government. For this court to adopt the view that it has such a status would be judicial legislation of the most obvious kind.

"Finally, on this particular aspect of the case at bar, we state that we know of no federal statute which gives a cause of action against a private person who has abridged another's right to freedom of speech

or to the free exercise of religion. *Cf.* Screws *v.* United States, U. S. , and Picking *v.* Penna. R. Co. (C. C. A. 3), F. 2d .

"The assertion that the actions of the defendant constitute censorship has in essence been discussed in the foregoing paragraphs. For a radio station to refuse to sell time in which an individual may broadcast his views may be censorship but we know of no law which prohibits such a course. As we have indicated a radio broadcasting station is not a public utility in the sense that it must permit broadcasting by whoever comes to its microphones. *Cf.* Pulitzer Publishing Co. *v.* Federal Communications Commission (C. A. D. C.) 94 F. 2d 249" (79a-80a).

Clearly, the issues attempted to be raised by the Petition, therein alleged to be novel, involve principles which have been well settled by this Court. There is no foundation to the allegation that the Petition presents for "the first time" a new question for the consideration of this Court. As the Court below determined, the Petitioners have failed to set forth any question which warrants judicial intervention.

3. Petitioners' contracts have all expired by their own terms, and the alleged issues relating thereto have become moot.

As hase been set forth in the Statement at the beginning of this brief, *all* of the contracts of *all* of the Petitioners (Plaintiffs in the District Court) have expired by their own terms, the last having expired on November 11, 1945.

Even if it were to be assumed that the Petitioners may have had some right at the time when they filed their Bill in the District Court, it is clear beyond any question that such rights have now expired and that questions relating thereto have become moot.

Certainly, the Petitioners have shown no proper reason for the granting of the Writ prayed for in this case, where Petitioners' rights, in accordance with the provisions of the agreements upon which they base their case, have come to an end.

It is submitted that for the reasons stated in the opinion of the Circuit Court, the Amended Bill of Complaint was properly dismissed on the ground that it stated no cause of action against the Defendant, and that for the reasons herein stated, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

WM. CLARKE MASON,
A. ALLEN WOODRUFF,
THOMAS B. K. RINGE,
W. THEODORE PIERSON,
F. CLEVELAND HEDRICK, JR.,
Attorneys for Respondent.

MORGAN, LEWIS & BOCKIUS,
PIERSON AND BALL,
Of Counsel.